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Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-321

DREWRYS LIMITED U. S. A., INC. AND LOCAL UNION NO. 275, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO,
Petitioners,

vs.

ANN BARTMESS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

JOHN W. MONTGOMERY,
MONTGOMERY & ZIMMERMAN,
708 Tower Building,
South Bend, Indiana 46601,
Attorney for the Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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OPINIONS BELOW.

The opinion of the District Court is not reported. The opinion of the Court of Appeals is not yet officially reported. Both opinions (including the District Court's oral decision) are reproduced as Appendix "A" to the Petition for Writ of Certiorari.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 7, 1971. The Clerk of this Court informed Respondent, upon inquiry, that a Petition for Writ of Certiorari was docketed on August 1, 1971, no notice thereof having been given by Petitioners in accordance with Rule 21. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED.

The statute involved is Title VII of the Civil Rights Act of 1964 (hereinafter called the Act). The relevant provisions of Title VII are 42 U. S. C. 2000e-2(a) and (e), 2000e-5(a), (d) and (e) and 2000e-12(b) and are set forth in the Appendix to this Brief *infra* at page A1.

The regulation is the Equal Employment Opportunity Commission (hereinafter EEOC) *Guidelines on Discrimination Because of Sex*, 29 C. F. R. Sec. 1604.31 and is set forth in the Appendix to this Brief *infra*, page A3.

QUESTIONS PRESENTED.

1. Is a female employee prior to her mandatory retirement a "person aggrieved" within the meaning of the Civil Rights Act of 1964 with standing to challenge the maintenance of a sex-based discriminatory retirement plan as a *present* discriminatory "condition" of employment?

2. Is there a variance between an administrative charge of discrimination alleging the maintenance of a sex-based discriminatory retirement plan and which also predicts in its text the charging party's mandatory retirement pursuant thereto if the plan continues and a subsequently filed judicial complaint alleging the maintenance of a sex-based discriminatory retirement plan and that a consequence of the continued maintenance of the previously administratively challenged retirement plan was the predicted mandatory retirement of the charging party?

3. Does a retirement plan which treats men and women differently in respect of their ages of retirement violate Title VII of the Civil Rights Act of 1964?

4. Can the EEOC's *Guidelines on Discrimination Because of Sex*, 29 C. F. R., Section 1604.31, be successfully interposed by Petitioners as an affirmative defense to nullify the Civil Rights Act of 1964 and to escape liability under Title VII of the Act?

STATEMENT OF THE CASE.

The Respondent does not accept the Petitioners' statement commencing at line 5 on page 7 of the Petition: "The complaint was bottomed on the Respondent's retirement which she alleged violated her civil rights under 42 U. S. C., Section 2000e-2(a) and (c)."

The Respondent's complaint alleged the maintenance by the Petitioners of an unlawful retirement plan discriminatory on the basis of sex and that a consequence of the continuance of that plan was her mandatory retirement at age sixty-two.

The Respondent does not accept the Petitioners' statement in the last paragraph commencing on page 7 of the Petition: "as noted in the opinion of the Court below, the trial court's dismissal was premised upon the finding that Respondent had failed to duly and timely file a written charge with the EEOC. In addition to the District Court's finding that the Respondent had failed to invoke its jurisdiction because of her failure to comply with the jurisdictional filing prerequisite of Section 706(d), the trial court also recognized that it did not acquire subject matter jurisdiction over the cause of action because the charge filed with the EEOC was in fatal variance with the complaint."

The District Court having erroneously concluded that the allegations of Respondent's judicial complaint were not consistent with her administrative charge then asserted the equally erroneous conclusion that Respondent had not timely filed her administrative charge because she lacked standing to do so at the time of its filing. This does not amount to a determination that the District Court lacked subject matter jurisdiction; rather it is a finding that, given

the District Court's view of the pleadings, Respondent lacked standing to invoke that jurisdiction.

Since the Court of Appeals reversed the District Court's threshold findings (and properly so), subject matter jurisdiction is implicitly found as the mandate makes clear. In short, the Court of Appeals held, and thus determined, that the District Court should have found that Respondent in fact had standing to invoke Title VII.

ARGUMENT.

The issues in the present case are simple and settled and no amount of sophistry can convert this case into one warranting review by this Court on certiorari.

To focus attention on precisely what are offered as issues for Supreme Court determination, it may be pointed out that the petitioners' basic contention that the terms of a retirement plan are not a "condition of employment" was rejected more than twenty years ago and that the decision of the Court of Appeals in this case holding that the terms of a retirement plan are a "condition of employment" is supported by an inexhaustible and unbroken line of appellate authority.

Similarly, the issue as to whether the EEOC *Guidelines on Discrimination Because of Sex* can be interposed by the petitioners to escape liability under the Civil Rights Act of 1964 has been decided adversely to the petitioners. The decision of the Court of Appeals that the date that respondent's rights became enforceable was the effective date of the Civil Rights Act and not the date of the *Guideline* is supported by uniform and persuasive appellate authority that administrative guidelines and regulations do not have the force of law and cannot abrogate rights established by law.

Other issues raised by the petition are peripheral and procedural and were correctly decided by the Court of Appeals in harmony with long established and well-settled principles. They involve no question of federal law.

The decision of the Court of Appeals is manifestly correct. There is no asserted conflict of decision among the circuits nor is there an important question of federal law requiring decision by this Court.

I.

AN EMPLOYEE HAS A PRESENT INTEREST IN THE TERMS OF A RETIREMENT PLAN ESTABLISHING DIFFERENT RETIREMENT AGES BASED ON SEX AND IS A "PERSON AGGRIEVED" WITH STANDING TO CHALLENGE THE MAINTENANCE OF SUCH POLICY AS A PRESENT DISCRIMINATORY "CONDITION" OF EMPLOYMENT.

Petitioners attack as palpably incorrect the holding of the Court of Appeals that respondent Ann Bartmess, as an employee, had a present interest in the maintenance of a retirement plan which regulated the terms and tenure of her employment. To reach this conclusion petitioners have completely ignored the simple fact that all that the Court of Appeals did was apply to Title VII a settled principle of labor relations which was developed by the courts more than twenty years ago under The National Labor Relations Act. The application of this principle to Title VII fits squarely within the statutory structure and fits within the unbroken line of appellate authority on the issue of Title VII standing.

One of the most stable and, indeed, unquestioned principles of our national labor policy is that a retirement plan is a "condition of employment" of those who are subject to its provisions. *Inland Steel Co.* v. *N. L. R. B.*, 170 F. 2d 247 (7th Cir., 1948), *cert. den.* 336 U. S. 960 (1949); *W. W. Cross Co., Inc.* v. *NLRB*, 174 F. 2d 875 (1st Cir., 1949); *Retail Clerks Union No. 1550, et al.* v. *N. L. R. B.*, 330 F. 2d 290, 215 (D. C. Cir., 1964), *cert. den.* 379 U. S. 823 (1964).

The same reasons that compel the conclusion that a retirement plan is a "condition of employment" under the NLRA compel the same conclusion under Title VII. In 1949 in the landmark *Inland Steel* decision the Court of Appeals

for the Seventh Circuit rejected the very same contentions which the petitioners in this case have made to that same Court twenty-three years later and which they now make to this Court. The *Inland Steel* court rejected as "without logic" the assertion that "an employee [such as respondent herein] is a stranger to a retirement and pension plan during all the days of his employment and that it affects him in no manner until he arrives at the retirement age."

The Court's reasoning in *Inland Steel* permitting Unions to bargain is this (170 F. 2d at 253):

> "Suppose that a person seeking employment was offered a job by each of two companies equal in all respects except that one has a retirement and pension plan and that the other did not. We think it reasonable to assume an acceptance of the job with the company which had such plan. Of course, that might be described merely as the inducement which caused the job to be accepted, but on acceptance it would become, so we think, one of the 'conditions of employment'. Everyday that such an employee worked his financial status would be enhanced to the extent that his pension benefits increased, and his labor would be performed under a pledge from the company that certain specified monetary benefits would be his upon reaching the designated age. It surely cannot be seriously disputed but that such a pledge on the part of the company forms a part of the consideration for work performed, * * *. In this view, the pension thus promised would appear to be as much a part of his 'wages' as the money paid him at the time of the rendition of his services. But again we say that in any event such a plan is one of the 'conditions of employment' ".

If these truisms concerning employee interest in retirement plans compel a company to bargain collectively with its employees' certified bargaining agent over "conditions of employment" in retirement plans, it is absurd to argue, as do petitioners, that a negotiated retirement plan al-

legedly violative of Title VII is not subject to challenge until one is compelled to retire pursuant to its terms.[1]

Section 703(a) and (c) (42 U. S. C. Sec. 2000e-2(a) and (c) say "(a) It shall be an unlawful employment practice for an employer—(1) * * * to *discharge* any individual, or otherwise to discriminate against any individual with respect to his *compensation, terms, conditions,* or *privileges* of employment, because of such individual's * * * sex * * * or; (2) to *classify* his employees in any way which would *deprive or tend to deprive* any individual of employment opportunities or otherwise *adversely affect his status as an employee,* because of such individual's * * * sex * * *." And that "(c) It shall be an unlawful employment practice for a labor organization—(1) * * * to discriminate against, any individual because of his * * * sex, * * *; (2) to * * * *classify* its membership, * * * in any way which would *deprive or tend to deprive* any individual of *employment opportunities* or would *limit such employment opportunities* or otherwise *adversely affect his status as an employee* * * * because of such individual's * * * sex * * *;"

Measured by these prohibitions the discriminatory effects flowing from a sex-based disparity in retirement ages between men and women are obvious and real. First, as has been seen, the plan itself constitutes a "term, condition, or privilege of employment" for all employees irrespective of whether its terms are discriminatory. Second, the benefits accrued or paid to employees—or promised to applicants upon hire—are a part of an employees' "compensation". Third, a forced retirement ordained under compulsory retirement age provisions is

1. We are surprised at the fact that the petitioner union is, in essence, undermining its own right to bargain collectively over retirement benefits. The union by joining with the petitioner company to ask this Court to review the legal foundation of *Inland Steel* is negating its own right to negotiate with the company over retirement plans as a part of the collective bargaining process.

tantamount to a "discharge". Fourth, the plan's sex-based retirement ages and sex-based benefit allocation constitute an employee "classification" which "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's * * * sex * * *".

Having seen that retirement plans are a "condition of employment" under which an employee labors "during all the days of his employment" a retirement plan establishing different retirement ages for men and women is, during its existence and by its very nature, a continuing condition of employment which "adversely affects his status as an employee because of such individual's * * * sex" proscribed by Section 703 (a) and (c) of the Act. 42 U. S. C. 2000e-2 (a) and (c).

Thus an employee who is subject to such a continuing discriminatory employment practice is a person aggrieved during the continuance of the discriminatory practice.

Indeed the Courts hold that Title VII protects the individual if injury is *threatened* to the class to which he belongs. In *Carr* v. *Conoco Plastics, Inc.*, 423 F. 2d 57 (5th Cir., 1970) the Fifth Circuit held that *applicants* for employment are persons aggrieved and have standing to attack "* * * employment practices committed by the same employer, if those practices, *although not directly injurious to them* at the time of their application, potentially affect them because of their race" (Emphasis supplied).

Discrimination on the basis of a class characteristic *i.e.*, race, sex, religion or national origin being the evil sought to be ended by the Civil Rights Act (*Bowe* v. *Colgate Palmolive*, 416 F. 2d 711 (7th Cir., 1969)), the rationale for granting to persons themselves not yet harmed the status of a "person aggrieved" is that "* * * the Damoclean threat of a * * * discriminatory policy hangs over the * * *

class." *Hall* v. *Werthan Bag Corporation*, 251 F. Supp. 184 (D. C. M. D. Tenn., 1966).

The courts, early on, recognized the clear distinction between a single, isolated completed act and a "continuing violation" and the significance of this distinction to the administrative and judicial procedures provided for by Title VII. See *Cox* v. *U. S. Gypsum Company*, 409 F. 2d 289 (7th Cir., 1969); *Charles King, et al.* v. *Georgia Power Company, et al.*, 295 F. Supp. 943 (D. C. N. D. Ga., 1968); *Culpepper* v. *Reynolds Metals Co.*, 296 F. Supp. 1232 (N. D. Ga. 1968), reversed on other grounds 421 F. 2d 888 (5th Cir., 1970).

Where, as in the present case, the discriminatory employment practice is a continuing practice and a continuing violation the courts have had no difficulty recognizing, and have uniformly held, that the ninety day period prescribed by Section 706 (d) [42 U. S. C. 2000e-5 (d)] of the Act for the filing of an administrative charge is of no practical importance or effect. *Cox* v. *U. S. Gypsum Company*, 409 F. 2d 289 (7th Cir., 1969).

Finally, it was too late for petitioners to object in the district court that the respondent's administrative charge was untimely filed with the Commission when they had adequate opportunity during the administrative process —lasting over two years—to raise that defense. Petitioners accepted service of the charge, permitted the Commission to investigate the allegations of that charge, and took part in conciliation efforts after they were in receipt of the Commission decision finding the retirement plan in violation of the Act. Clearly, petitioners could have resisted service of the charge, or they could have resisted the Commission's investigation by raising objections under the procedure provided in Section 710 of the Act, 42 U. S. C. Section 2000e-9 (d). By not objecting during the administrative process, petitioners made it highly unlikely, if not

impossible, for respondent to have done what they later claim should have been done—that respondent should have waited and filed the charge within ninety (90) days after her involuntary retirement. The Commission was investigating the respondent's charge, with the cooperation of the petitioners, during the time in which petitioners now contend that a new charge should have been filed by respondent alleging the identical conduct. In fact, respondent was involuntarily retired under the retirement plan only four days after the Commission served the charge upon petitioners.

That it is now too late for petitioners to object that respondent's administrative charge was prematurely filed has recently been judicially confirmed by the Fifth Circuit in *Boudreaux* v. *Baton Rouge Marine Co.*, ... F. 2d ....., 3 FEP Cases 99, February 1, 1971, where the District Court granted summary judgment against the plaintiff on the ground that the plaintiff had not met the "jurisdictional prerequisite" for suit of being personally affected by the alleged discrimination within ninety (90) days prior to the filing of charges with the EEOC. The Court of Appeals for the Fifth Circuit reversed holding that where the EEOC had once determined that a charge was timely, and that the charging party was a person aggrieved within the ninety (90) day period, and had actually entered into a conciliation attempt, it is not in keeping with the Congressional intent that the timeliness of the filing of the EEOC charge should be open to reconsideration by the Court, when, often years or many months afterward, a suit is filed because conciliation has failed.

Thus the respondent's statutory and adjudicated status as a person aggrieved with standing to challenge the maintenance of a sex-based discriminatory employment practice as a present discriminatory condition of employment is pure and the decision of the Court of Appeals so holding is clearly correct.

II.

THERE IS NO VARIANCE BETWEEN THE ADMINISTRATIVE CHARGE OF DISCRIMINATION ALLEGING MAINTENANCE OF A SEX-BASED DISCRIMINATORY RETIREMENT PLAN AND THE SUBSEQUENTLY FILED JUDICIAL COMPLAINT ALLEGING THE MAINTENANCE OF SUCH PLAN AND THAT A CONSEQUENCE OF ITS CONTINUED MAINTENANCE WAS THE PREDICTED MANDATORY RETIREMENT OF THE CHARGING PARTY.

The petitioners concede that in her administrative charge the respondent alleged that petitioners had committed and were committing an unlawful employment practice in violation of Title VII by maintaining a retirement plan which discriminated against her because of her sex (Petition page 6 footnote 1). She further said that if this plan were to continue to June 30, 1967, her card would be pulled and she would not be able to work any more.

In her judicial complaint, filed more than two years later and after EEOC investigation and failure of conciliation, respondent alleged petitioners' maintenance of an unlawful sex-based discriminatory retirement plan, that it did in fact continue, her card was in fact pulled and she was discharged pursuant to the plan.

The administrative charge said the illegal retirement plan if continued will cause my termination; the judicial charge said the illegal retirement plan did continue and did cause my termination.

It is simply absurd to say that the respondent in her judicial charge complains only of the effect which she predicted if by that it is meant that she has abandoned her prior claim of the illegality of the cause.

There is a perfectly obvious continuity running through the administrative charge to the judicial pleading.

Petitioners' position vis a vis the judicial complaint derives inter alia from a pervasive and persistent unwillingness to accept the remedial and humanitarian underpinnings of Title VII. Mindful of these, however, the courts have been extremely reluctant to allow procedural technicalities to bar claims brought under the Act. *Sanchez* v. *Standard Brands, Inc.*, 431 F. 2d 455 (5th Cir., 1970).

Sanchez brings to sharp focus the necessity for these judicial safeguards at page 460, footnote 1, and quotes the Seventh Circuit in *Choate* v. *Caterpillar Tractor*, 402 F. 2d 357 (7th Cir., 1968) 359 when that court recognizes the role of the private litigant in the context of Title VII cases. "His role assumes great significance because of the unusual nature of the EEOC. 'Unlike so many Governmental structures in administrative law, [the] EEOC is an administrative agency without the power of enforcement.' *Pettway v. American Cast Iron Pipe Co.*, 411 F. 2d 998 (5th Cir., 1969) 1005. * * * 'Enforcement of the rights of aggrieved parties resides exclusively in the Federal Courts. * * *' Thus it is obvious that the private litigant's right of access to the courts must be vigilantly protected, for if the courthouse door closes in his face, enforcement of the Act ceases to exist."

From the cases has emerged what may be considered a general rule based upon its inherent logic within the statutory scheme that the allegations of the judicial complaint may encompass any kind of discrimination like or related to allegations made in the administrative charge and growing out of such allegations during the pendency of the case before the Commission. "Any other result would be destructive of the beneficent ends of this legislation." *King* v. *Georgia Power Company*, 295 F. Supp. 943 (D. C. N. D. Ga. 1968) (p. 947).

The *Sanchez* court distills the essence of the combat and approves the colorful manner of characterizing the en-

counter between a Title VII complainant and a "huge industrial employer" as a "modern day David and Goliath confrontation" adding that "In such a confrontation, surely Goliath should not be allowed to fell David with the help of a club fashioned from forms and legal technicalities. The most elementary principles of justice require us to remove this club and compel a battle on the *merits* of the controversy" (p. 467).

But in any event, there is, in fact, no variance in this case. To give viability to the petitioners' contentions would require that the court ignore the most fundamental doctrines firmly established, universally understood, uniformly accepted and invariably applied governing construction and appellate review when confronted with a motion to dismiss an action under Rule 12(b).

This issue raised by the petitioners is merely peripheral to the present posture of this case. It does not in any sense broadly concern the practices sought to be eradicated by the Act. The decision of the Court of Appeals is clearly correct; there is no conflict of decision among the circuits; there is no important question of federal law.

III.

A RETIREMENT PLAN WHICH TREATS MEN AND WOMEN DIFFERENTLY IN RESPECT OF THEIR AGES OF RETIREMENT VIOLATES TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

The Civil Rights Act of 1964 prohibits sex-based discrimination in "conditions of employment".

A retirement plan is a "condition of employment".

A sex-based disparity in retirement ages of men and women violates the Act.

The Court of Appeals was thus clearly correct in holding that a sex-based retirement plan establishing different retirement ages for men and women violates Title VII.

As we have already seen, the principle underlying this holding is neither new nor novel. The decision simply requires the application to Title VII of the established principle of labor relations that a retirement plan is a "condition of employment".

To reach this conclusion merely involves a plain meaning construction of the language of the Act and, as the Court of Appeals said, the petitioners "have come forward with no reason why we should conclude that the language of Title VII does not mean what it says."

Although the present case is the only case at the appellate level on this point, its holding is no departure from established doctrine.

There is, however, one other decision directly on point and it has held, as did the Court of Appeals, that retirement plans containing differing treatment of men and women in respect of retirement ages violates Title VII. *Rosen et al. v. Public Service Electric Company,* ..... F. Supp. ..... (D. C. N. J. 1970) (2 FEP Cases 1090 (1970) (3 Employment Practices Decisions 6208) (affirmed on rehearing 3 E. P. D. 6216).

That court found that the retirement plan it considered "as it existed prior to the revision of May 1, 1967, violated Title VII by discriminating against male employees in favor of female employees on no other apparent basis than that of sex" 2 FEP Cases 1094).

The court then held that "after reviewing Title VII, its legislative history and the cases decided subsequent to its enactment, this court concurs with the judgment of the Equal Employment Opportunity Commission that differences in retirement plans, be the plan optional or compulsory, are violative of Title VII of the Civil Rights Act of 1964".

In the course of reaching this decision the *Rosen* court made an exhaustive study of the legislative history of the Act and of the commentaries on it and said in respect of that history and the statement of Senator Humphrey made in a letter written several years later, upon which petitioners rely: "The debates in Congress neither support nor refute Senator Humphrey's letter."[2] (p. 1096.)

There is no comfort for the petitioners in the legislative history of the Act. Neither is there refuge for them in their contention that the respondent is estopped to contest the legality of her retirement pursuant to a collective bargaining agreement negotiated by the petitioner Union because she was one of its members. It should suffice to say here, as *Rosen* v. *Public Service Electric Co.*, 2 FEP Cases 1090 *supra,* held that "private parties cannot agree to perform illegal acts" and that "relief may be granted to remedy present and continuing effects of past discrimination." *Griggs* v. *Duke Power Company*, 420 F. 2d 1225 (4th Cir., 1970) 1230.

Petitioners invitation to this Court to carve out an "equitable exception" should be recognized and labeled for what

2. "Some classification schemes which use sex as a factor by which to place employees in one class or the other do so pursuant to a statistically valid difference between the sexes. The type of classification presents a subtle problem with regard to the definition of explicit discrimination prohibited by Section 703(a).[37]

37. Congressional intent concerning the effect of Title VII on use of such statistical differences between the sexes was unclear. Senator Humphrey felt that differences of treatment of the sexes in industrial benefit plans, including early retirement options for women, were not illegal under Title VII because of the addition of Section 703(h) [42 U. S. C. Sec. 2000e-2(h)] to the Act. *110 Cong. Rec.* 13,663-64 (1964). The relevant part of Section 703(h) provides that differences in compensation paid to employees are not illegal if authorized by the Equal Pay Act of 1963, 29 U. S. C. Sec. 206(d) (1964). The effect of this amendment is that interpretations of the two statutes, which are administered by different agencies, will not contradict each other. Since the Equal Pay Act makes no provision whatsoever for a sex-based difference in retirement age or benefits, Senator Humphrey's interpretation is quite puzzling.' *84 Harvard Law Review* 1109, 1172-1173.

it is: an invitation to this court to repeal Title VII by judicial legislation, to grant petitioners a judicial license to thwart a stable principle of our national labor policy, to violate the law and "to freeze an entire generation of female employees into discriminatory patterns that existed before the Act" condemned by the Fourth Circuit in *Griggs* v. *Duke Power Company, supra,* quoting and relying upon *Quarles* v. *Phillip Morris, Inc.,* 279 F. Supp. 505, 516 (E. D. Va., 1968). Such an exception would not be "equitable". It would be illegal.

Again the Court of Appeals is clearly correct. There is no conflict of decision among the circuits; there is no important question of federal law not settled by this Court, nor has the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.

IV.

EEOC'S GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C. F. R. SECTION 1604.31 CANNOT BE SUCCESSFULLY INTERPOSED BY PETITIONERS AS AN AFFIRMATIVE DEFENSE TO LIABILITY UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

The petitioners' position is rendered no more tenable by virtue of the attack upon the Commission's *Guidelines on Discrimination Because of Sex,* 29 C. F. R., Sec. 1604.31(a). In the final analysis, the *Guideline* questioned is relevant here only insofar as it buttresses the contention of the respondent that the retirement plan in issue is outlawed by Title VII.

As should be clear from the foregoing discussion of the legislation, the Commission has made an eminently reasonable interpretation of the Act in this *Guideline* which states [29 C. F. R. 1604.31(a)]:

> "A difference in optional or compulsory retirement ages based on sex violates Title VII."

This published pronouncement is entitled to great weight in that it reflects the considered opinion of the agency charged with the day-to-day responsibility of obtaining compliance with the Act. *Cox* v. *United States Gypsum Co.*, 409 F. 2d 289, 291 (7th Cir., 1969); *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357, 360 (7th Cir., 1968); *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228, 235 (5th Cir., 1969). *Cf. Udall* v. *Tallman*, 380 U. S. 1, 16 (1965).

Contrary to the position of petitioners in the lower courts, the distinctions carved out in the retirement plan did not switch from legal to illegal upon the effective date [October 1, 1968] of the Commission's *Guideline* on that subject. The conduct which was challenged by respondent before the EEOC and before the courts below was made illegal by Congress on July 2, 1965, and not by the Commission at some later date. The *Guideline* in question performs only the function of providing those subject to the Act with advance warning that adherence to certain policies will constitute, in the opinion of the agency, a violation of the Act. This important function was noted by the Court in *American Newspaper Publishers Association* v. *Alexander*, 294 F. Supp. 1100, 1103 (D. D. C., 1969): "The promulgation of interpretive guidelines is a necessary function of an agency which is entrusted with the duty of administering a statute. In the case of a statute such as Title VII, where emphasis is placed on voluntary compliance with the requirements of non-discrimination, and where there is a general lack of guideline precedent, the promulgation of reasonable interpretive guidelines has the salutary effect of informing the public of the Commission's interpretation of the statute." Thus, a guideline is no more or no less than an announcement that the Commission will decide certain types of complaints under the aegis of a general rule.

The suggestion that such an administrative announcement is required as a prelude to accountability under the

statute is without merit. Recently, under Title II of the Civil Rights Act of 1964, the Court of Appeals for the Fifth Circuit in *Miller* v. *Amusement Enterprises*, 426 F. 2d 534 (5th Cir., 1970), rejected a similar contention. There, defendant argued that it takes a prior judicial announcement to activate a federal statute and that a first-impression offender is not subject to remedy. In rejecting this argument Chief Judge Brown aptly noted that:

> "* * * The reasoning would essentially transplant the effective date of any statute from the date fixed by the legislature to the date of the first authoritative judicial interpretation. It would also mean that the person whose post-effective date (as legislatively fixed) action is the first to be judicially declared in violation of the statute could not be held accountable. Nor, for that matter, could any others whose actions, which otherwise would be thought of as plain violations of the statute, had taken place between the effective date as fixed by the legislature and the first judicial pronouncement. Conversely the injured party would have few if any remedies even though expressly provided by the statute until some other plaintiff had preceded him in breaking the ground.
>
> "A fictionalized approach which grants effectual absolution to the first defendant (civil or criminal) and makes a sacrificial lamb of the first victim is hardly acceptable." 426 F. 2d at 536.

Obviously, since a judicial pronouncement is not required to activate a statute, an administrative announcement could not be required. Moreover, since a guideline does not affect the authority of a federal court to "interpret the statute differently" from the Commission as stated in a guideline [*American Newspaper Publishers Association* v. *Alexander, supra* at 1103] or in an administrative decision, petitioners' reliance on the non-existence of a guideline is clearly misplaced.

Any contention that the Commission in its guideline somehow destroyed the respondent's rights before a court

have been put to rest by the Seventh Circuit's recent decision in *Flowers* v. *Laborers International Union, Local 6,* ..... F. 2d ....., 2 FEP Cases 881 (7th Cir., 1970) at 883, where the Court, quoting from the Third Circuit opinion in *Fekete* v. *United States Steel Corp.*, 424 F. 2d 331, stated that (2 FEP Cases at 883):

> "We cannot accept the hypothesis that Congress intended to entrust the key to judicial relief with an agency given no power to direct the processing of the civil action in court.
>
> "Unquestionably, the Commission's role is an important one, designed to encourage and to effect a voluntary compliance with the provisions of the Act. But in the role of investigator and conciliator, the Commission is not the final arbiter of an individual's grievance. Under Title VII that function is vested solely in the Courts. No power to issue penalty, citation, or cease and desist orders have been vested in the Commission by Congress.
>
> "In sum, we do not conceive the role of the Commission to be that of exclusive administrator of the Act. Although it is entrusted with important and sensitive responsibilities of investigation and conciliation, it was not intended by Congress to preempt the ultimate rights of the claimant, the person the Act was designed to protect. We therefore conclude that the ultimate decision whether the claim is real or fanciful must be for the courts, and not the Commission.
>
> "We hold that the intention of Congress in Title VII was: First, to outlaw [discriminatory] employment practices * * *; second, to require that 'a person claiming to be aggrieved' must first resort to the Commission's processes; third, to insure that if the Commission finds reasonable cause, it will attempt to effect voluntary compliance by the employer; fourth, to provide that once the 'person claiming to be aggrieved' satisfies the statutory requirement of affording the Commission the opportunity to perform its statutory function, he has the right to a judicial determination whether he has been a victim of a violation. *Fekete*

v. *United States Steel Corp., supra* at 6677 (footnote omitted)."

Finally, we fail to perceive how the Commission guideline concerning retirement plans could have possibly affected the status of this case before the district court. The only effect which such a guideline can have is contained in Section 713(b) of Title VII [42 U. S. C. 2000e-12(b)] which states that:

> "In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice *if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission* * * *" (Emphasis supplied.)

In this case, the respondent filed her charge with the Commission approximately one year before the Commission, on February 24, 1968, issued the guideline in question. There was no guideline or other written interpretation in existence on which petitioners could plead and prove reliance under Section 713 [42 U. S. C. 2000e-12(b)]. The subsequently issued guideline could not possibly have affected their conduct and cannot now be interposed as a defense.

What the Petitioners persist in overlooking is the fact that Congress delayed the effective date of certain provisions of the Act, including the effective date of Section 703, from the date of its passage to one year thereafter, to-wit: July 2, 1965, in order to provide ample time within which to comply with its requirements.

That this Court should be importuned to grant certiorari on the basis of two telephone calls from two other large "nationally known employers" who likewise had one year

to come into compliance, but who apparently are still in open violation of the Act, is so incredibly preposterous as to be unworthy of notice and so we ignore it.

CONCLUSION.

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN W. MONTGOMERY,
MONTGOMERY & ZIMMERMAN,
708 Tower Building,
South Bend, Indiana 46601,
Attorney for the Respondent.

APPENDIX A.

1. Section 2000e-2(a) and (c) of Title 42 of the United States Code provides in material part that:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) * * * to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *; or
>
> (2) to * * * classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *.
>
> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to * * * classify its membership * * * in any way which would deprive or tend to deprive any individual of employment opportunites, or would limit such employment opportunities or otherwise affect his status as an employee * * * because of such individual's * * * sex * * *; or
>
> (2) to cause or attempt to cause an employer to discriminate against an individual in violation of this Section.

2. Section 2000e-5(a), (d) and (e) of Title 42 of the United States Code provides in material part:

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved * * * that an employer, * * * or labor organization has engaged in an

unlawful employment practice, the Commission shall furnish such employer, * * * or labor organization * * * with a copy of such charge and shall make an investigation of such charge, * * *. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion * * *.

(d) A charge under Sub-section (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred * * *.

(e) If * * * the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, * * *.

3. Section 2000e-9(d) of Title 42 of the United States Code provides in material part that:

(d) In any proceeding brought by the Commission under subsection (b) of this section, except as provided in subsection (c) of this section, the defendant may petition the court for an order modifying or setting aside the demand of the Commission.

4. Section 2000e-12(b) of Title 42 of the United States Code provides in material part:

(b) * * * no person shall be subject to any liability * * * on account of (1) the commission by such person of an unlawful employment practice if * * * the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the commission * * *.

APPENDIX B.

The Equal Employment Opportunity Commission's *Guidelines on Discrimination Because of Sex*, Section 1604.31(a), 29 C. F. R. Section 1604.31(a) provides in material part that:

> Pensions and Retirement Plans. (a) A difference in optional or compulsory retirement ages based on sex Violates Title VII.